

## **REMARKS**

Claims 51-76 are pending in this application. New claims 75-76 have been added by this amendment. This amendment involves no new matter.

In the subject Office Action, the Examiner objected to the designation of “new” for claims 51-74. The Examiner rejected claims 51 and 73 under 35 U.S.C. § 112; rejected claims 51-73 under 35 U.S.C. § 101, rejected claims 51 and 73 under 35 U.S.C. § 102 (c) based on Crampton (US 7,184,047); rejected claims 51-53, 55, 57-59, 67 and 72-74 under 35 U.S.C. § 103 based on Posa (US 2003/0108851) in view of Crampton; and rejected claims 68-71 under 35 U.S.C. § 103 based on Posa in view of Crampton in further view of Abrams (US 5,673,691). Applicant gratefully acknowledges the Examiner’s indication of allowability of claims 54, 56, and 60-66 if not dependent on a rejected base claim. Applicant respectfully requests reconsideration in light of the foregoing amendments and the following remarks.

### **A. Claim Objections**

The Examiner objected to the claims on the ground that the claim status identifier shows all claims as “new.” However, as the claims were not amended in the Request for Continued Examination filed August 13, 2008, such status identifiers were correct. Nevertheless, in this Response, Applicant has changed the claim status identifiers appropriately in view of the amendments made herein.

### **B. Rejection under 35 U.S.C § 112**

The examiner argued that claims 51 and 73 recite the limitations “said regimen” and “said first image” without proper antecedent basis for those limitations. Applicant respectfully disagrees and directs the Examiner’s attention to line 2 of claim 51, which positively recites “a prescribed regimen” which serves as proper antecedent basis for “said regimen.” Likewise, line 5 of claim 51 positively recites “a first image,” which serves as proper antecedent basis for “said first image.” The same is true for both of those terms in claim 73. Therefore, the rejection under 35 U.S.C. § 112 is improper and should be withdrawn.

### **C. Rejection under 35 U.S.C. § 101**

The Examiner rejected claims 51 -73 under 35 U.S.C. § 101 as not falling within one of the four statutory categories of invention. Applicant respectfully disagrees and points out that claims 51 and 73 are directed to a method for producing an image in which a first image is created by modifying a generic image, and a second image is created by modifying the first image. The first and second images are representative of a person. Thus, because an image representative of a physical person is being transformed into a different state or thing, the claimed methods clearly meet the “transformation” prong of the “machine-or-transformation test” set forth by the U.S. Supreme Court and recently clarified by the U.S. Court of Appeals for the Federal Circuit. *See Gottschalk v. Benson*, 409 U.S. 63, 67 (1972); *In re Bilski*, 545 F.3d 943, 956 (Fed. Cir. 2008). Therefore, the rejection under 35 U.S.C. § 101 is improper and should be withdrawn.

### **D. Rejection under 35 U.S.C. § 102 (e) based on Crampton**

The Examiner’s rejection of claims 51 and 73 under 35 U.S.C. § 102(e) based on Crampton is improper and should be withdrawn. In claim 51, Applicant recites producing an image predictive of a person’s appearance resulting from following a prescribed regimen. The Crampton reference does not disclose predicting a person’s appearance resulting from following a prescribed regimen. Rather, Crampton simply allows a user to input a weight that does not correspond to the user’s actual weight. *See Crampton*, col. 52, l. 9-18. In the scenario described by Crampton, a hypothetical weight may be used to specify an input for the avatar body mass. *Id.* The relationship between body mass in a pre-regimen and post-regimen condition is not considered by Crampton. Additionally, claim 51 recites a body shape designation, which is neither disclosed nor suggested by Crampton. As described in Applicant’s specification, a body shape designation is an indication representative of where fat should be placed on the model of a person’s body. *See Specification* at p. 17, l. 4-10. Crampton does not even recognize a need for such a body shape designation, much less teach or disclose the same. The body outline data of Crampton referenced by the Examiner is simply that—an outline—and does not correlate to a distribution of fat. Similarly, claim 73 recites producing an image predictive of a person’s

appearance resulting from following a prescribed regimen, which Crampton does not disclose. Additionally, claim 73 recites adjusting a first image by increasing or decreasing at least one of a representation of an amount of fat or a representation of an amount of muscle independently of the other. Crampton does not disclose any attempt to specifically model fat or muscle, let alone any ability to adjust fat or muscle independently of the other. Therefore, claims 51 and 73 and their dependent claims are allowable over Crampton.

#### **E. Rejection under 35 U.S.C. § 103 based on Posa in view of Crampton**

The Examiner's rejection of claims 51-53, 55, 57-59, 67 and 72-74 under 35 U.S.C. § 103 based on Posa in view of Crampton is improper and should be withdrawn. With regard to claim 51, contrary to the Examiner's assertion, among other things, Posa does not disclose a body shape designation as recited in claim 51. The Examiner asserts that "measurement of body parameters such as waistline, body volume body weight representative of the body shape in page 1 Para 0005, the program assists the person to achieve the desired body shape based on a comparison of the difference in the body parameter and creating the image representative of the image difference." Applicant respectfully asserts that the Examiner has misinterpreted a fundamental limitation in the Posa measurement procedure to derive body parameters. Posa discloses "measuring a body parameter such as waistline, body volume, body weight, body fat percentage, metabolic rate, and the like, and comparing the body parameter with an initial body parameter so as to determine a body parameter difference." See Posa at ¶ [0005]. Posa further specifies in the same sentence "determining a progress level of the person at intervals during the program ... for example by imaging the person and comparing this image with the initial image so as to determine an image difference." *Id.* As explained above, however, Applicant's body shape designation deals with a distribution of fat, which Posa does not disclose or suggest. Moreover, to define a body shape designation from a body parameter difference would necessarily imply that the body shape designation could only be found after subsequent or multiple measurements. In order to define a body parameter based on differences, an individual would have to be measured at multiple times. The time delay between initial measurement and subsequent measurements, characterized by a discernable difference in body parameters, could be lengthy and will be related to the accuracy with which the parameters may be measured and to the rate of change with time for the defining metrics for the specific individual. This time delay

is important because Applicant's disclosure teaches, among other things, the ability to attract clients by correlating their body types to a specific workout regimen from the onset of the regimen. The time limitations fundamental to the Posa reference are not inherent in Applicant's claim. There is no teaching or suggestion in either Posa or Crampton of a body shape designation, and as such the combination of references does not make Applicant's claim obvious. Claims 52, 53, 55, 57-59, 67 and 72 depend either directly or indirectly upon claim 51 and therefore are also not obvious in regards to Posa in view of Crampton. In a similar manner, applicant's claim 73 recites adjusting a first image by increasing or decreasing at least one of a representation of an amount of fat or a representation of an amount of muscle independently of the other, which is neither taught nor suggested by Posa or Crampton, alone or in combination. As such, both claim 73 and the dependent claim 74 are allowable over Posa and Crampton.

#### **F. Rejection under 35 U.S.C. § 103 based on Crampton in view of Posa in further view of Abrams**

The Examiner's rejection of claims 68-71 under 35 U.S.C. § 103 based on Posa in view of Crampton and in further view of Abrams is improper and should be withdrawn. As described above, claim 51 is allowable over the art of record, so this rejection is moot and claims 68-71, which depend from claim 51, are also allowable.

#### **G. New Claims 75-76**

Applicant has submitted new claims 75-76, which are allowable over the art of record. Independent claim 75 recites, among other things, creating a second image representative of said person in a post-regimen condition by modifying said first image based on at least one feature in said regimen and said second data set, which is neither disclosed nor suggested by any of the art of record, alone or in combination. Such modification of said first image based on at least one feature in said regimen and said second data set is supported in Applicant's specification. Applicant describes, among other features of said regimen, "Resistance Training Session Calories" and "Days of Resistance Exercise." See Specification at p. 29, l. 3. Applicant further describes that "[t]he caloric value of a resistance training session or a cardiovascular exercise session varies with the intensity of the workout. Therefore, the value used in the calculations

will vary depending on the type of exercise program selected.” See Specification at p. 29, l. 10-12. A relationship between both resistance and cardiovascular training sessions and caloric contributions to weight loss is further referred to in the table included on page 30, line 4. This table also discloses additional features of caloric contributions of a regimen including the use of a personal assistant in training sessions and the use of dietary supplements. The caloric contributions of a regimen are related to fat loss as described among other locations in Applicant’s disclosure on page 30, lines 6-7. A relationship between fat loss and the resulting second image representation of an individual is disclosed, among other locations, in Applicant’s Figures 17 and 18. Claim 75 also recites that the method may be applied using a computer. Applicant has support for the use of a computer in several locations of the disclosure. For example, Applicant discloses on page 10, lines 3-4 that “[t]he computer can be any of several well-known and readily available systems, such as IBM-compatible personal computers.” Applicant further discloses on page 14, line 18 in reference to the “Method of Producing the Predicted Image” that “the following method is implemented in software.” The use of software inherently describes the use of a computer.

Independent claim 76 recites, among other things, adjusting said first image by increasing or decreasing at least one of a representation of a fat layer and a representation of a muscle layer independently of the other. Such adjusting is supported in the specification at page 21, lines 12-19, and Figs. 17-19. Independent claim 76 also recites, among other things, creating a second image representative of said person as said person is predicted to appear after following said regimen by modifying said first image based on at least one feature of said regimen and said second data set. As described above, the modification of said first image based on at least one feature in said regimen and said second data set is supported in multiple positions of applicant’s disclosure. Claim 76 further recites, among other things, that the method may be applied using a computer. As described above, Applicant has support for the use of a computer in several locations of the disclosure.

## **H. Conclusion**

In view of the foregoing, Applicant respectfully submits that claims 51-76 are in condition for allowance, and such is earnestly requested. If the Examiner believes a telephone

conference will advance the prosecution of this application, the Examiner is respectfully requested to contact the undersigned attorney.

The fees for this submission are being paid by credit card. However, the Commissioner is authorized to charge any deficiency in fees or credit any overpayment to Deposit Account No. 03-3483.

Respectfully submitted,

/court b. allen/

Courtenay B. Allen

Reg. No. 43,469

COX SMITH MATTHEWS INCORPORATED

112 East Pecan Street, Suite 1800

San Antonio, Texas 78205-1536

(210) 554-5389

(210) 226-8395 (FAX)

ATTORNEYS FOR APPLICANTS

Date: 1-28-2009

Electronic submission USPTO EFS Web Filed 1-28-2009
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